

January 15, 2013

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

FRANCISCO NUNEZ,

Defendant–Appellant.

No. 12-3185
(D.C. Nos. 5:11-CV-04118-RDR and
5:09-CR-40039-RDR-1)
(D. Kansas)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, Chief Judge, **McKAY** and **HOLMES**, Circuit Judges.

Appellant seeks a certificate of appealability to appeal the district court’s denial of his 28 U.S.C. § 2255 habeas petition. Appellant pled guilty to a federal drug charge and was sentenced to 121 months of imprisonment, one month above the statutory mandatory minimum sentence for his offense. Appellant filed an appeal, but his appeal was dismissed pursuant to the plea agreement’s waiver of appellate rights. In his § 2255 motion, Appellant claimed he received ineffective assistance of counsel during the plea negotiations because counsel failed to advise him of the deportation consequences of

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

pleading guilty and promised he would receive a lower sentence than the sentence he ultimately received. After reviewing the record, the district court concluded there was no factual support for Appellant's claims. The record, including Appellant's own statements at the change of plea hearing and at sentencing, clearly demonstrated that Appellant was indeed informed of the possibility of deportation and of the potential sentence he faced. Because the record conclusively refuted Appellant's factual allegations, the court denied the habeas petition without holding an evidentiary hearing.

After thoroughly reviewing Appellant's arguments and the record on appeal, we conclude that reasonable jurists would not debate the district court's decision. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, for substantially the same reasons given by the district court, we **DENY** Appellant's request for a certificate of appealability and **DISMISS** the appeal. We also **DENY** Appellant's request for the appointment of legal counsel to represent him on appeal. Appellant's motion to proceed *in forma pauperis* on appeal is **GRANTED**.

ENTERED FOR THE COURT

Monroe G. McKay
Circuit Judge